Supreme Court, U.S.
FILED

(1)

03 519 SEP 16 2003

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

TWELVE PIECES OF PROPERTY ET. AL.
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petition for Writ of Certiorari TIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

1. May the government force a defendant to forego one United States Constitution Fifth Amendment protection (self-incrimination) to preserve other constitutional rights (5th, 6th, and 14th Amendments; double jeopardy, due process, right to counsel and protection against punitive taking of property)?

2. Does it violate fundamental fairness and due process of law to force a defendant to forego a defense to punitive administrative forfeitures to preserve fifth amendment privileges based upon existing law [i.e., existing case law interpretation and restrictive application of "limited use immunity" under Simmons v. United States, 390 U.S. 377 (1968), as not applying to claims of ownership in forfeitures] and then, based upon a temporary change in the law by one three judge Ninth Circuit panel, [i.e., United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995) cert. den'd, 518 U.S. 1007 (1996), which was subsequently disavowed as dicta by another three-judge Ninth Circuit panel in United States v. Scrivner, 189 F.3d 825 (9th Cir. 1999),] hold a defendant to a duty of "clairvoyance" as to such shift in the law, so as to imply a knowing waiver to retroactively deny double jeopardy protection notwithstanding prior punishment?

3. Where the government makes a tactical decision to gain prosecutorial advantage to force a defendant to face parallel 21 U.S.C. § 841 et seq. criminal drug prosecution and forfeitures and punitive 21 U.S.C. § 881 civil forfeitures based on the same offenses, said forfeitures factually, tactically, statutorily and procedurally in personam under United States v. Ursery, 518 U.S. 267 (1996), with the "purpose or effect" of punishing a defendant (Id. at 289 n.3) and in fact punishes a defendant by forfeiting his property due to his forced decision to forego a potentially incriminating

claim, and defense, in the punitive civil forfeitures, as a result of the "Hobson's choice" presented by said government's tactical decision to "force a fight on two fronts," do the doctrines of fundamental fairness, due process, the rights against self-incrimination and to counsel, and double jeopardy preclude the subsequent criminal prosecution or subsequent punitive in personam forfeitures?

4. When a defendant has suffered punitive in personam forfeitures of his property under United States v. Ursery, 518 U.S. 267 (1996), can he then be placed in jeopardy of subsequent prosecution and punishment, and tried, convicted, and sentenced to two life terms and have additional property subject to punitive in personam forfeiture based on the same offenses and evidence that were the basis of the prior forfeitures?

5. Were the forfeitures, that are the subject of this writ of certiorari, factually, tactically, statutorily and procedurally, in personam?

6. Did the forfeiture proceedings violate Mr. Plunk's rights of due process under the fifth and fourteenth amendments and his rights to counsel under the sixth amendment and his rights against double jeopardy under the fifth amendment?

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Petitioner, Twelve Pieces of Real Property et al., by and through owner Gerald Frank Plunk, who has been subjected to parallel and serial punitive in personam forfeitures and criminal convictions, respectfully prays for a Writ of Certiorari to review the judgment herein of the United States Court of Appeals for the Ninth Circuit dated January 10, 2003 in Ninth Circuit No. 98-35702 [App. 1].

IV. REFERENCE TO OPINIONS IN THE CASE.

The Judgment of the United States Court of Appeals for the Ninth Circuit was rendered in an unpublished memorandum / order filed January 10, 2003 in Ninth Circuit No. 98-35702. Petitioner's Petition for Rehearing was denied June 18, 2003 [App. 1].

V. GROUNDS FOR JURISDICTION.

This Court has jurisdiction to issue a Writ of Certiorari under 28 U.S.C. § 1254. The Petition is timely as the initial Ninth Circuit Memorandum / Order was filed January 10, 2003; and, a timely Petition for Rehearing was denied on June 18, 2003 [App. 1].

VI. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED.

The case involves the Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, 18 U.S.C. §§ 853, 881, 19 U.S.C. §§ 1602-1609, 21 U.S.C. §§ 841, 843, 846, 848, 853, 881, and 28 U.S.C. § 1254. The text of same and related jurisdictional statutes and procedural rules are set out in the Appendix.

VII. STATEMENT OF THE CASE AND BASIS FOR JURISDICTION IN COURT OF FIRST INSTANCE.

A. Introduction

Mr. Plunk, owner of the property, was subject to parallel and serial punitive in personam forfeitures and criminal convictions, serving double life terms for two post-forfeiture convictions of 21 U.S.C. §§ 841(a)(1) and 846 offenses (distributing and conspiracy to distribute cocaine) factual basis of which was same evidence for prior in personam punitive administrative forfeiture(s) within the holding of United States v. Ursery, 518 U.S. 267 (1996).

Accordingly, based on same criminal offenses, allegations and evidence, Mr. Plunk has been subjected to four initial in personam summary administrative punitive forfeitures of property seized from his person and house, criminal trial with conviction and two life sentences, and after defense judgment of acquittal as to forfeiture, two subsequent post-criminal sentencing, punitive in personam forfeitures of numerous airplanes and real property [App. 53; 69 126-143].

Although instant case, is in fact "Plunk IV," no court has yet reached or ruled on merits as to obvious double jeopardy issues encompassed by parallel and serial in personam punitive forfeitures of Mr. Plunk's property and criminal convictions, barred by the Supreme Court holding in Ursery.[1]

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[1]Most of Mr. Plunk's charges were initially dismissed on double jeopardy grounds by the magistrate and the U.S. District Court on November 18, 1996, under the 9th Circuit decision in U.S. v. $405,089.23 in U.S. Currency, 33 F.3d 1210 (9th Cir. 1994), amended, 56 F.3d 41 (9th Cir. 1995). They were reinstated in the interlocutory appeal(s) in No. 94-30421 and 94-30422, 95 WL 619299 (9th Cir. United States

B. Statement of Facts and Procedural History

1. Criminal Case(s):

On March 22, 1994, Mr. Plunk was indicted on single 21 U.S.C. §§ 841 and 846 count of allegedly conspiring to distribute cocaine within Alaska (hereinafter the "Alaskan I Conspiracy") between Fall of 1987 and April of 1991. In Igiugig, Alaska, at Big Mountain Lodge, he learned there was an arrest warrant, and he surrendered [App. 163].

During his initial meeting with federal authorities, allegations were made concerning government belief Mr. Plunk participated in and/or had knowledge of an additional 21 U.S.C. §§ 841 and 846 cocaine conspiracy involving transportation of cocaine across the United states for a fee (hereinafter the "Lower 48 Conspiracy") [App 146].

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v. Plunk, October 17, 1995) cert. den'd 517 U.S. 1188 (1986) (hereinafter "Plunk I") based on United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995) cert. den'd 518 U.S. 1007 (1996) which was a new, unforeseen position by one Ninth Circuit panel affording (contrary to prior law, and now to current law) "Simmons Use Immunity" for claims of ownership as to forfeitures, which was given retroactive application to Mr. Plunk to manufacture a "waiver," notwithstanding it was unprecedented under the law. Cretacci was then disavowed by another Ninth Circuit Panel in United States v. Scrivner, 189 F.3d 825 (9th Cir. 1999) after the Supreme Court reversed United States v. $405,089.23 and Ursery. The panel in Scrivner, held Certacci was mere dicta, and Scrivner could (as Mr. Plunk and his counsel had predicted and feared the law would be) in fact be convicted on basis of non-privileged claim of ownership in forfeiture properties as there was no such use immunity.

Mr. Plunk was subsequently reindicted and detained without bail while awaiting trial.[2] Mr. Plunk's case went to trial on or about July 24, 1995. Significantly, jury hung on CCE count (Count 2), acquitted on one distribution counts (Count 9), hung on another distribution count (Count 10), and hung on Alaskan Conspiracy count (Count 12)[App. 33-35].

Although Mr. Plunk only faced a sentence of 324-405 months pursuant to an offense level of 41, his sentencing was adjusted upward 2 offense levels such that he received two life sentences without parole, based upon a purported finding he had testified falsely at Pierson's sentencing because Pierson, after months of incarceration including a brutal assault by inmates, testified falsely at Mr. Plunk's sentencing hearing as to Mr. Plunk's knowledge of Pierson's mens rea in an attempt to curry favor with the Government in his own case.[3] Notes in Pierson's handwriting, contained in his trial counsel, Marcus Paine's file, in the possession of Mr.

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[2] The trial of his co-defendant, Timothy Pierson, was severed and tried in February 1995.

[3] In finding at his sentencing Mr. Plunk had obstructed justice by testifying at Mr. Pierson's sentencing hearing, District Court mischaracterized his testimony, stating Mr. Plunk had affirmatively represented the initial meeting between himself, Mr. Pierson and Mr. Malca was "completely innocuous and legitimate." See U.S. v. Plunk, Case No. A94-0036 CR (JWS). On the contrary, Mr. Plunk never represented he himself was unaware of the illegality of the meeting, but only there were no blatant, outward representations to Mr. Pierson illegal activities were being discussed. Judge Sedwick found Mr. Plunk obstructed justice, although he did not find Pierson obstructed justice, even though Judge Sedwick specifically stated, at Mr. Plunk's sentencing hearing, he had found Pierson lied when he sentenced him.

Pierson's appellate counsel, Kevin McCoy, were not provided to Mr. Plunk's counsel, despite their value as impeaching evidence, in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)[App. 118; 121, 123].

His charges were first dismissed by the U.S. District Court pre-Cretacci, reinstated on interlocutory appeal in United States v. Plunk, No. 94-30421 and 94-30422 ("Plunk I") and a petition for certiorari was denied in United States v. Plunk, 517 U.S. 1188 (1996); his conviction was affirmed on direct appeal in United States v. Plunk, 153 F.3d 1011, (9th Cir. (Alaska) Aug. 28, 1998) ("Plunk II") and certiorari affirmed in United States v. Plunk, 526 U.S. 1060 (1999). His post-conviction relief habeas corpus petitions were denied in the district court and the 9th Circuite denied a certificate of appealability in United States v. Plunk, Case No. 62-35573 on November 27, 2002 ("Plunk III") and certiorari was denied on May 27, 2003 Gerald Frank Plunk v. United States, No. CV-00-00093 (JWS), cert. den'd, No. 02-1544 (2003). This instant matter is in fact "Plunk IV."

2. U.S. District Court for the District of Alaska In Personam Punitive Forfeiture Proceedings

Criminal search and arrest warrants resulted in the search of Mr. Plunk's home and physical arrest, based on an affidavit of DEA Agent Cayford of 3/22/94 (hereinafter "Cayford Affidavit") i.e. same evidence as to same criminal offenses serving as basis for Mr. Plunk's criminal conviction and punitive, in personam forfeitures of his property. Items taken from home at search, and watch stripped from his person at arrest, were subject of four in personam administrative forfeitures which constituted punishment based on said same probable cause and offenses for which he was subsequently tried, convicted and sentenced. Due to tactical decision to institute parallel and serial in personam punitive

forfeitures and criminal indictment for the same alleged offenses, including a criminal 21 U.S.C. § 848 and/or § 853 forfeiture count, Mr. Plunk and his counsel were faced with "Hobson's choice," i.e., "faced a battle on two fronts" and thus due to state of law that there was (and still is) no "use immunity" regarding incriminating claims of ownership as to forfeitures were forced to preserve Mr. Plunk's fifth amendment privileges by foregoing formal claim of ownership or defense to in personam punitive administrative forfeitures [App 89; 94; 103-113].

At time of such forced decision, to wit, preserving one basic constitutional right (self-incrimination) by foregoing others (due process and right to be free from punitive forfeiture and punishment), no ruling of the United States Supreme Court or circuits had authorized any type of "limited use immunity" under the doctrine of Simmons v. United States, 88 S.Ct. 967 (1968) as to potentially incriminating claims of ownership made by property owner and defendant in punitive forfeiture proceedings under 19 U.S.C. § 1609 and 21 U.S.C. § 881.

To achieve such punitive "purpose or effect," the Government simultaneously brought criminal indictment, criminal forfeiture and in personam administrative forfeiture actions under 21 U.S.C. § 881(b)(1), 21 U.S.C. § 853(a) and (j), and 19 U.S.C. § 1602, et seq., against certain of Mr. Plunk's personal property, valued at approximately $16,167.89, and by utilizing the tactical "Hobson's choice" obtained summary forfeiture. This was based on same facts alleged and offenses set out in the 3/22/94 Cayford Affidavit.

As a result of administrative in personam forfeitures, Mr. Plunk moved to dismiss criminal indictment, alleging double jeopardy violation (Exc. 0059). Magistrate Judge John Roberts, and District Court Judge John W. Sedwick, granted Defendant's motion in part, holding Government's administrative forfeitures were punishment, and criminal

prosecution therefore violated double jeopardy clause.[4] Government filed interlocutory appeal (C.A. 9th No. 94-30421), and Defendant cross-appealed (C.A. 9th No. 94-30422).[5]

After such partially successful jeopardy challenges, and cross interlocutory appeals by defendant and government, a Ninth Circuit panel, in previously unpublished opinion in the instant case entitled United States v. Plunk, No. 94-30421 and 94-30422, 95 WL 619299 (9th Cir. October 17, 1995), cert. den'd 517 U.S. 1188 (1996) (hereinafter "Plunk I"), applied United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995), cert. den'd 116 S.Ct. 2528 (1996), which approved a totally unforeseen and unprecedented "use immunity" rule for ownership claims as to forfeitures, and did so retroactively to Mr. Plunk, although it was subsequently disavowed in United States v. Scrivner, 18 F.3d 825 (9th Cir. 1999). Plunk I panel incorrectly stated Mr. Plunk had not been "punished" since he had impliedly "abandoned" the property in face of punitive forfeiture due to forced failure to file a claim [App. 10-26].

Plunk I court thus avoided "Hobson's choice" issue, prior to Supreme Court's decision in United States v. Ursery,

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[4]Basis for Magistrate Judge Roberts and Judge Sedwick's ruling on double jeopardy was United States v. $405,089.23 United States Currency, 33 F.3d 1210 (9th Cir. 1994), amended, 56 F.3d 41 (9th Cir. 1995, [subsequently reversed sub. nom. United States v. Ursery, 116 S. Ct. 2135 (1996).]

[5] Judge Sedwick held that prosecution for Conspiracy charged in Count 1 and distributions charged in Counts 9, 10 and 11 was precluded by double jeopardy, but erroneously held prosecution for CCE and telephone counts were not, because he incorrectly concluded they were not lesser included offenses, misapplying Jeffers v. United States, 432 U.S. 137 (1977). Mr. Plunk cross-appealed on this point.

supra, notwithstanding no court had ruled pre-Cretacci, (or has since) Simmons limited use immunity extended to claim of ownership or defense in forfeiture action.

After United States v. $405,089.23 was reversed by Ursery, different Ninth Circuit panel disavowed Cretacci in Scrivner refusing to follow it, holding it mere dicta and defendant therein could be convicted as the claims of ownership were non-privileged and with no such "Simmons use immunity."

Thus, but for brief "Certacci/Plunk I" window there was not, and is not, any such "use immunity" for ownership claims in forfeiture, to wit classic "Hobson's Choice." After referenced in personam administrative forfeiture proceedings, and punishment, the government brought in U.S. District Court in personam civil forfeiture proceedings pursuant to the provisions of 21 U.S.C. § 881 (a)(6) and/or 18 U.S.C. § 981 (a)(1)(A) and criminal forfeiture proceedings (in the criminal indictment) under 21 U.S.C. §§ 848 and 853 in attempt to forfeit following additional property:

1) One heat sealed bag of approximately $5,000 in U.S. currency;

2) $50,000 in U.S. currency;

3) 1967 U206B Cessna No. N4994F;

4) 1964 Cessna No. N5217U;

5) 1975 SUPERCUB, PA-18, IDENTIFICATION # N454 B;

6) 1986 ARROW GARE SEAHAWK, IDENTIFICATION # N76 KD;

7) The real property at T17NR5W, Section 33, Seward Prime Meridian, Alaska, Tract A, Plat 77-49, Alaska State Land Survey No. 76-182;

8) 12.32 acres of real property at Inlet View Subdivision, MATSU Borough, Alaska, Lot 2 Block 1, Lot 10 Block 1, Lot 11 Block 1, Lot 7 Block 6;

9) .60 acres of real property at Rabbit

Creek Heights Block 4 Lot 6, Anchorage, Alaska, with all appurtenances and improvements thereon [App. 2].

On September 8, 1994, the Government had previously filed U.S. District Court in personam complaint for forfeiture against Mr. Plunk as to four airplanes,[6] some used at Big Mountain Lodge, arising out of same criminal investigation, alleging Mr. Plunk was registered owner of aircrafts, based on affidavit of DEA Agent Cayford of 9/8/94 (i.e., basically the same affidavits as for Mr. Plunk's arrest, search of his home, and administrative forfeitures). That action was initially entitled United States v. Four Aircraft, No. A94-401 CIV, subsequently consolidated with United States v. Twelve Pieces of Property, No. A96-335 CIV, referred to herein. No. A94-401 CIV was stayed on motion of government pending criminal trial and resurrected over Mr. Plunk's objection after Mr. Plunk's conviction [App. 126-132].

Four aircraft subject of A94-401 CIV were also specified by government in a bill of particulars (with other instant property) to be subject of criminal indictment and trial of 21 USC §§ 848 and 853 CCE forfeiture counts in United States v. Plunk, No. A94-036 CR, as to much of which property court granted judgment of acquittal. After said judgment of acquittal the government then filed against non-aircraft property in A96-335 CIV (again based largely on the information and offenses in Cayford affidavits of 3/22/94 and 9/8/94), and A94-401 CIV and A96-335 CIV were consolidated.

As noted, prior to and/or and simultaneous to criminal prosecution and certain of instant U.S. District Court forfeiture proceedings Government brought in personam punitive civil administrative forfeiture actions under 21

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[6] That is, certain of the aircraft which are the subject of this writ of certiorari.

U.S.C. § 881(b)(1), 21 U.S.C. § 853(a) and (j), and 19 U.S.C. § 1602, et seq., against certain of Mr. Plunk's personal property, valued at approximately $16,167.89, seized on March 24, 1994, during search of Mr. Plunk's residence and/or from his person on March 25, 1994, at his surrender and arrest, including cash, gold, guns, and a Rolex watch removed from his wrist, all of which government claimed were proceeds of illegal drug transactions. Said properties were subsequently declared summarily forfeited in June and August of 1994, pursuant to punitive in personam declarations of forfeiture under 21 U.S.C. § 881 and 19 U.S.C. § 1602 et seq., listing Gerald Frank Plunk as the "Owner" of said properties. Mr. Plunk could not enter a formal claim for said properties due to "Hobson's Choice," that is, exercising his right to counsel as to necessity to preserve his Fifth Amendment rights in simultaneously ongoing criminal prosecution, forfeitures[7] [App. 134-143].

Moreover, in criminal trial, government likewise failed to show proof of forfeiture as to many of properties subject of the instant writ of certiorari, which were the subject of the 21 USC §§ 848 and 853 CCE forfeiture counts as set out in indictment and/or in bill of particulars. On November 15, 1996, the Honorable John W. Sedwick, United States District Court Judge, issued an Order from Chambers (Re: Motion

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[7] As to instant forfeitures, Mr. Plunk, through counsel, in both A96-335 CIV and A94-401 CIV, repeatedly objected to Hobson's choice, sought stays and/or specific rulings regarding "Simmons/Cretacci" immunity to protect Fifth Amendment rights, objected on Fifth and Sixth Amendment and double jeopardy and due process grounds, and due to prior in personam punitive administrative forfeitures, criminal trial and conviction, and judgment of acquittal, all requests to no avail, as they were opposed by government, and denied by court.

for Judgment of Acquittal - Dockets 382/403) which held defendant Gerald Frank Plunk in the case of United States of America v. Gerald Frank Plunk, et al., Case No. A-94-36 CR (JWS), was "entitled to a judgment of acquittal as to the forfeiture of the Cabin, Tract A, the Inlet View Lots, the Rabbit Creek Lot, the Sky Harbor Lot, and the Aircraft."

The District Court held the government, in criminal case against Mr. Plunk, had not met requisite evidentiary standard to support forfeiture of property listed above, due to fact government was unable to establish requirements of 21 U.S.C. § 853(d)(1) and (2) by preponderance of evidence. (See also United States v. Hernandez-Escarsega, 886 F.2d 1560 (9th Cir. 1989.) At that time, the Court concluded its Order would bar subsequent civil forfeiture proceedings by government against aircraft based on res judicata, and a presentation of defense of issue preclusion [App. 14].

Not satisfied with first jeopardy bite of apple (in personam administrative forfeitures) or second jeopardy bite (in personam criminal conviction and sentencing of Mr. Plunk) or unsuccessful third jeopardy bite of apple (their failure to obtain in personam criminal forfeiture of the instant subject proceedings at criminal trial), government then filed Action No. A96-335 CIV[8] as to non-aircraft properties which (like the aircraft) had been subject of their subsequently unsuccessful attempts to obtain forfeiture at the criminal trial, and consolidated same with the pending Action No. A94-401 CIV, i.e., the in personam punitive civil aircraft forfeitures.

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[8] Again, this was based largely on the same evidence and/or subsequently obtained evidence, which later evidence would be precluded by United States v. $405,089.23 United States Currency, 122 F.3d 1285 (9th Cir. 1997) and United States v. $191,910 United States Currency, 16 F.3d 1051 (9th Cir. 1994).

However, following motions to dismiss instant civil forfeiture actions against defendant properties and oral argument supporting and opposing the motions, United States District Court issued a subsequent Order from Chambers on May, 19, 1997 (Re: Motion to Dismiss-Docket 44). In this Order, the Court amended previous Order of November 15, 1996, which held the government would be precluded from initiating civil forfeiture proceedings against defendant properties pursuant to issue preclusion principles of res judicata [App. 21-23].

Order of May 19, 1997, addressed dilemma faced when ruling on Defendant's motion to dismiss government's attempt at civil forfeiture of the defendant aircraft. The court noted the government had failed to present evidence in criminal case against Mr. Plunk sufficient to show probable cause to forfeit defendant aircraft: Court knew the government in fact did not present evidence at trial sufficient to show probable cause to forfeit that property embraced by the pending motions [i.e., the real property and aircraft, with the exception of the $5,000 and $50,000], although there was no specific finding to that effect in the criminal case and judgment of acquittal did not necessarily constitute such a finding.

Moreover, Court failed to recognize as to most property, requisite specific nexus, via evidence in government's possession at time of seizures, was not shown. See $405,089.23 and $191,910 (discussed infra).

Court refused to recognize jeopardy bar to such instant forfeitures from prior administrative forfeiture, intervening trial and conviction, or judgment and acquittal as to certain properties in criminal action .

On July 15, 1998, Mr. Plunk and counsel still suffered the "Hobson's choice" regarding right to remain silent and Fifth Amendment vis-à-vis Mr. Plunk's desire to defend as to criminal charges on appeal. Government, [as they

subsequently conceded as to much of the forfeited property when they settled with Mr. Plunk and paid damages mid-appeal,] did not and could muster proof as required. Yet, the United States District Court denied Mr. Plunk's renewed request for a stay, granted government's motion for summary judgment regarding forfeiture of above-listed property. On August 26, 1998, U.S. District Court Judge signed government's submitted Final Decree of Forfeiture [App. 53].

While in Plunk IV the government confessed error mid-appeal as to the 1986 Arrow Gare Seahawk, 1967 U206B Cessna, 12.32 acres of property, .60 acres of unimproved property, and a 1964 206 Cessna (and paid damages of approximately $350,000), [App. 48-49] and Ninth Circuit reversed due to lack of probable cause as to the Hock Lake Property and the 1975 SuperCub and remanded, they affirmed as to the $5,000.00 in a heat-sealed package, $50,000.00 substituted for the Big Mountain Lodge [App. 2, 46-47].

Accordingly, Mr. Plunk was repeatedly forced to "run the gauntlet," i.e., "fight a war on numerous fronts," where government gained significant tactical advantage by splitting its causes of action, which, in reality, have been from the outset in personam punitive punishment as to Mr. Plunk and his property within meaning of United States v. Ursery, 116 S.Ct. 2135 (1996).

Such procedure violates Mr. Plunk's rights to due process and effective assistance of counsel under the United States Constitution, including the Fourth, Fifth and Sixth Amendments, and to be free from double jeopardy, including his historical rights to be free from being forced to "wage a war on multiple fronts."

By gaining such tactical advantage, utilizing the "Hobson's choice," i.e., precluding Mr. Plunk and counsel from effectively defending against any forfeitures via testimony by Mr. Plunk or providing meaningful discovery,

etc., government obtained punishment of Mr. Plunk within meaning of double jeopardy clause; accordingly, all criminal punishment or sentencing of Mr. Plunk or forfeiture of his properties post initial punitive in personam administrative forfeitures, and certainly post-criminal trial, are jeopardy barred.

VIII. REASONS FOR GRANTING CERTIORARI.

A. Government May Not Force a Defendant to Forego Protection Under the Fifth Amendment of the United States Constitution to Preserve Other Constitutional Rights.

The Fifth Amendment right against self-incrimination protects a claimant in civil forfeiture proceedings initiated by the government and said right may be exercised via advice of counsel under the Sixth Amendment. While the government asserted in this case it met its burden of showing probable cause for forfeiture of the defendant properties, nonetheless, it further successfully argued claimant Mr. Plunk cannot raise his Fifth Amendment privilege if he is to rebut government's claims.

The Ninth Circuit Court of Appeals has held "forfeiture statutes are deemed criminal for the purpose of protecting rights secured by the Fourth and Fifth Amendments . . . ." United States v. One 1970 Pontiac GTO 2-Door Hardtop, 529 F.2d 65, 66 (1976). The Ninth Circuit was referring specifically to the Fifth Amendment protection from self-incrimination, citing United States Supreme Court decision in Boyd v. United States, 116 U.S. 616 (1986) which dealt exclusively with that clause of the Fifth Amendment in civil forfeiture proceedings.

In later case decided by United States District Court of Oregon, court reiterated "quasi-criminal" nature of

forfeiture actions, United States v. $75,040.00 in United States Currency, 785 F. Supp. 1423, 1425 (D.Or. 1991), holding it could not force claimant to waive his Fifth Amendment privilege, but court would not be prevented from "drawing a negative inference against a party to a civil action who refuses to testify, but only, *in response to probative evidence offered against him.*" United States v. $75,040.00, at 1429 (quoting Baxter v. Palmigiano, 425 U.S. 308, 318-319 (1976) (emphasis added.)

Government in this case (as they subsequently conceded and/or the 9th Circuit held) offered no adequate probative evidence to support showing of probable cause for forfeiture of most of defendant properties, but simply took tactical advantage of Mr. Plunk at the administrative forfeiture level and then in United States District Court, by making initial discovery requests, in response to which claimant Mr. Plunk invoked his Fifth Amendment privilege for his protection prior to a final resolution of the criminal charges against him so as to allow government gain further tactical advantage via the "Hobson's choice."

B It Violates Fundamental Fairness and Due Process of Law to Force a Defendant to Forego a Defense to Punitive Administrative Forfeitures to Preserve Fifth Amendment Privileges Based Upon Existing Law [i.e., Existing Case Law Interpretation and Restrictive Application of "Limited Use Immunity" under Simmons v. United States, 390 U.S. 377 (1968),] or not applying to claim of ownership in forfeiture and then, Based Upon a Temporary Change in the Law by One Three Judge Ninth Circuit Panel, [i.e., United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995) cert den'd, 518 U.S. 1007 (1996), which was Subsequently Disavowed As Dicta by Another Three-Judge Ninth Circuit Panel in United States v.Scrivner,

189 F.3d 825 (9th Cir. 1999),] and Hold a Defendant to a Duty of "Clairvoyance" as to Such Shift in the Law, So As to Imply a Knowing Waiver to Retroactively Deny Double Jeopardy Protection Notwithstanding Prior Punishment.

There is no question but that record demonstrates government made tactical choice to seek punitive in personam punitive civil forfeitures against Mr. Plunk and his property at time he was facing criminal indictment, and even after trial and conviction, while on appeal, so as to present him and counsel with "Hobson's choice" and "force a fight on two fronts." The foundation of Fifth Amendment prohibition against such a government tactics and parallel or successive prosecutions which are barred by double jeopardy traces its origins to Greek and Roman law. See United States v. $405,089.23 in U.S. Currency, 33 F.3d 1210 (9th Cir. 1994), amended, 56 F.3d 41 (9th Cir. 1995); and United States v. Ursery, 116 S.Ct. 2135 (1996).

The record clearly demonstrates from outset Mr. Plunk and his property have been subject of tactical punitive and serial in personam forfeitures and penalties within meaning of United States Supreme Court's ruling in United States v. Ursery, supra [App. 10-32].

Ursery Court made two unequivocal statements in holding, namely: (1) forfeiture penalties which are "punitive" in "purpose or effect" are in personam and are distinct from in rem civil forfeitures which are purely remedial," and accordingly, such in personam punitive actions give rise to double jeopardy bar; and (2) even some nominally "in rem" civil forfeitures would constitute "punishment" within meaning of double jeopardy clause bar to further prosecution, "where the 'clearest proof' indicates that an in rem civil forfeiture is so punitive either in purpose or effect' as to be equivalent to a criminal proceeding...." Ursery at 2148, n.3

(emphasis added). The "clearest proof" exists as to Mr. Plunk and his property.

Nonetheless, court in United States v. Plunk, 94-30421 (Plunk I), United States v. Plunk, 153 F.3d 1011(9th Cir. (Alaska) Aug. 28, 1998) (Plunk II), United States v. Plunk, A94-0036 CR (JWS) (Plunk III) and United States v. Twelve Pieces of Property, et al., No. 98-35702 (Plunk IV) failed to follow Ursery.

While panel's opinion in Plunk II recognized this language from Ursery at 153 F.3d 1030 and acknowledged these two clear teachings of Ursery, court refused to rule on Mr. Plunk's argument that "factually, tactically, statutorily, and procedurally, the subject administrative forfeitures...were in fact in personam criminal forfeitures tactically directed at [him] to punish him." Plunk II at 153 F.3d 1030.

Panel in Plunk II improperly stated at 153 F.3d 1029 consideration of Mr. Plunk's Ursery double jeopardy claims were barred by decision in United States v. Plunk, Nos. 94-20421, 94-30422 and 1995 WL 619299 (9th Cir. Oct. 17, 1995), cert. denied 517 U.S. 1188 (1996) (Plunk I), wherein court had mistakenly found under United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995), Mr. Plunk's coerced decision to forego filing an administrative claim and contesting civil forfeitures to protect his Fifth Amendment privilege in pending criminal case meant property was "abandoned," "the forfeiture of Plunk's abandoned property was not a 'punishment,' and thus Plunk was not placed in jeopardy."

This language in Plunk II, which served as basis of U.S. District Court and the Ninth Circuit to deny habeas corpus relief in Plunk III, is misapplication of law of the case doctrine, ignores effect of Ursery on Plunk I and Cretacci, and further, overlooks material facts concerning in personam punitive nature of the forfeitures and resulting "Hobson's choice." At the time of court's ruling in Plunk I, relevant law in the Ninth Circuit as to double jeopardy implications of civil

forfeitures was United States v. $405,089, 33 F.3d 1210 (9th Cir. 1994), amended, 56 F.3d 41 (9th Cir. 1995). United States v. Ursery, 116 S.Ct. 2135 (1996), clarified such law. In Ursery, while Court reversed lower court in Ursery and $405,089.23, this Court clearly distinguished between in personam punitive forfeitures, holding such forfeitures which were clearly "punitive" in either "purpose or effect" did invoke the double jeopardy clause as opposed to in rem civil forfeitures which were purely remedial and did not do so. The Court held squarely even civil forfeitures could be punitive and thus in personam where there was such proof of the purpose or effect, as in the instant case. See Ursery at 2148, n.3.

Cretacci and Plunk I, II and III panels denied double jeopardy protection under transparent subterfuge there had been voluntary "abandonment" of property in punitive administrative proceedings, notwithstanding under then-existing case law, i.e., the "limited use immunity" Simmons afforded potentially incriminating statements and claims of ownership made to convey standing in Fourth Amendment suppression motions, gave no such protection for a property owner claiming incriminating property in a punitive administrative forfeiture proceeding [App. 98-113].

This patently frivolous and unsupported claim of "waiver" and "abandonment" cannot be said to be founded on any evidence of a "knowing" or "voluntary" relinquishment of any constitutional right. See Johnson v. Zerbst, 304 U.S. 458, (1963). Via such judicial "sleight of hand" the Plunk I panel avoided the Ninth Circuit holding in United States v. $405,089.23, supra, and now the Plunk II and Plunk III panels have avoided the doctrine enunciated in n.3 in Ursery that punitive in personam forfeiture conveys protection of a jeopardy bar to subsequent prosecution or punishment.

Not only is such extension of Simmons use immunity ill-advised in terms of policy considerations for courts, but it

is not clear such Simmons "limited use immunity" will in fact be afforded in future to defendants the Ninth Circuit, or other circuits, since Cretacci was the first case to so rule and many other circuits have not yet adopted such an ill-advised, unprecedented doctrine.[9] From a practical and policy view, many troubling questions exist as to the wisdom, scope, and application of such use immunity. Does it apply to mere use, or derivative use? What procedures apply to prevent taint to subsequent prosecutions? How does one build the proverbial "Chinese Wall" and what procedural hearings, safeguards, etc. are mandated and who has the burden of proof to show taint or lack of taint?

It is clear not only was Mr. Plunk punished before his criminal trial by punitive in personam forfeitures of his property directed against him in a personal fashion, but he likewise suffered such punishment after his criminal trial, while his criminal appeal was pending, notwithstanding his criminal conviction and sentence and a successful judgment of acquittal as to the criminal forfeitures in the criminal trial.

To allow this procedure to exist means the government can continue to gain tactical advantage and inflict punishment on defendants who cannot defend themselves or their property by instituting in personam punitive forfeitures as to potentially incriminating property, secure in the knowledge that any competent defense counsel and defendant, until an acquittal or final resolution of a merit appeal, must forego making administrative forfeiture claims

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[9] Moreover, the Ninth Circuit has now cynically and conveniently disavowed Cretacci in Scrivner, refusing to follow it, holding such language as to use immunity is "mere dicta," and allowing a conviction for possession of a machine gun and an unregistered firearm based on a claim of ownership in a forfeiture proceeding United States v. Scrivner, 189 F.3d 825 (9th Cir. 1999).

or interposing a defense (as Scrivner and his attorney should have done) and thus suffer forfeiture. The government can then claim "abandonment" or "waiver" and avoid the underlying teachings of Ursery.

Further, even if Cretacci, supra, is viewed as good law, Cretacci dealt with in rem remedial civil forfeitures, not in personam punitive civil forfeitures which were instituted as a tactical ploy by government.

Where a matter is in personam as opposed to remedial civil in rem proceedings, and thus punitive, burden should remain on government and never shift, and defendant should be allowed to defend himself based upon presumptions of innocence, relying on Fifth Amendment privilege.

Defendant must be able to stand silent and avoid self-incrimination, without affirmative duty to incriminate himself to avoid a "waiver" or "abandonment" argument.

This forced Mr. Plunk and counsel to "fight on two fronts" and face "Hobson's choice" of tactical hardship, i.e., suffer punitive forfeiture of property or preserve Fifth Amendment privileges.

There was (1) no voluntary abandonment of property; (2) no waiver of double jeopardy claim; and (3) a clear "purpose and effect of punishment" under Ursery, such that in personam focus of the forfeitures constituted double jeopardy punishment.

C. Government's Tactical Decision to Force a Defendant to Face Parallel 21 U.S.C. § 841 et seq. Criminal Drug Prosecution and Forfeitures and Punitive 21 U.S.C. § 881 Civil Forfeitures Based on the Same Offenses Forces the Defendant to Face an Unlawful "Hobson's Choice" which is Violative of the Doctrines of Fundamental Fairness, Due Process, Rights Against Self-Incrimination and to Counsel, and Double Jeopardy.

Given obvious in personam nature of the initial administrative forfeitures and continuing tactical ploy of government to take advantage of Mr. Plunk via "Hobson's Choice," double jeopardy precludes any post-administrative forfeitures of Mr. Plunk's property or criminal punishment or post-trial forfeitures of Mr. Plunk's property.

Present forfeiture proceedings (as were the post-administrative forfeiture criminal trial and sentencing) are jeopardy barred both by said prior administrative forfeitures as in personam forfeiture proceedings as opposed to in rem proceedings and as such are punitive and subject to double jeopardy as well as by the criminal trial [App. 126-132].

In U.S. v. Ursery, 116 S.Ct. 2135 (1996), this Court reversed the Sixth Circuit's decision in U.S. v. Ursery, Case No. 95-345, and the Ninth Circuit's decision in U.S. v. $405,089.23, because administrative forfeitures at issue were "in rem civil forfeitures" "neither punishment" nor criminal for purposes of the Double Jeopardy Clause." Ursery at 2149.

The decision distinguished such in rem civil forfeitures as non-punitive, due to their remedial purpose, and due to fact they did not tactically focus on punishment of person in contrast to "in personam civil or criminal penalties." Supreme Court cited basic distinction recognized between "in rem civil forfeiture proceedings," which were not punitive and characterized as remedial and against property, and "in personam civil or criminal penalties" which are tactically directed against a person (i.e. Mr. Plunk) and are punitive and thus invoke the double jeopardy clause as enunciated in United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). Ursery Court likewise relied on basic distinction, as set out One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (per curium) and Various Items of Personal Property v. United States, 282 U.S. 577 (1931), between in rem civil forfeiture proceedings as against the property

(remedial and non-punitive), and in personam proceedings directed against the person i.e. Mr. Plunk (punitive and thus protected by double jeopardy).

In n.3 in Ursery at 2148, this Court recognized even an in rem civil forfeiture which was "so punitive whether in purpose or effect" as to be "equivalent to a criminal proceeding . . . may be subject to the Double Jeopardy Clause (citing United States v. One Assortment of 89 Firearms, at 1105).

In the instant matter, factually, tactically, statutorily, and procedurally, instant U.S. District Court forfeitures and subject prior administrative forfeitures, which Judge Sedwick properly found were based upon the criminal conduct resulting in Mr. Plunk's conviction, are in fact in personam criminal forfeitures in purpose tactically directed at the person of Mr. Plunk to punish him, and it follows Mr. Plunk is entitled to protection of Double Jeopardy Clause precluding further punishment for same.

Administrative seizures and forfeitures of the property, and the instant U.S. District Court seizures/forfeitures were pursuant to search warrants based upon the affidavits of 1994 and 1996, which were largely identical [App. 75]. Administrative notices of seizures were issued as conscious punitive tactical ploy by government, to gain procedural benefits of 19 U.S.C. § 1602 et seq., as to lesser standard and burden of proof, and "Hobson's Choice" presented by resulting threat to Mr. Plunk's Fifth Amendment rights after Mr. Plunk was indicted for such underlying criminal conduct and/or contemporaneous with grand jury proceedings for same.

In addition, despite district court's ruling in Plunk III, in light of "contrary intervening controlling authority," the "law of the case" excuse can no longer be used. In United States v. Scrivner, 189 F.3d 825 (9th Cir. 1999), the Ninth Circuit has now clearly retreated from Cretacci, treating the

so-called "implied Simmons use immunity" holding, which was the cornerstone of the Plunk I and Plunk II holdings regarding the purported "abandonment" of the property or "waiver" of double jeopardy rights, as mere dicta and not good law. Scrivner, 189 F.3d at 828. In Scrivner, court ruled in fact a defendant faced with such a "Hobson's choice" made a potentially incriminating claim of ownership in a forfeiture proceeding at his peril, there was no "Simmons use immunity," and admissions could be used against him in a criminal proceeding to support a conviction.

Thus, Cretacci, upon which Plunk I relied, has been abandoned, and Scrivner decision constitutes contrary intervening controlling authority. Accordingly, any reliance by district court in Plunk III on the "law of the case doctrine" was erroneous.

D. A Defendant Who Suffers Punitive In Personam Forfeitures of His Property Can Not Be Placed in Jeopardy of Subsequent Prosecution and Punishment, Nor Can He Suffer Subsequent In Personam Forfeitures.

It was and is patently unfair and violates Fifth Amendment, due process, and double jeopardy to continue to force a defendant to "fight on two fronts," "face the Hobson's choice," and not be allowed to testify in the instant matter without jeopardizing his rights with the criminal matter is pending. Accordingly, district court should not have granted summary judgment, or final judgment of forfeiture, and should have ruled further efforts of government to forfeit the property are barred by principles of res judicata, collateral estoppel and double jeopardy.

Given the procedural and substantive history of the case there is no question but that basic forfeiture in this matter is "in personam," that is, a punitive criminal forfeiture

found against Mr. Plunk, as was the forfeiture of items previously forfeited as a result of the criminal investigation and search warrant and arrest, including the Rolex watch, firearms and gold. The forfeiture of those items is sufficient to invoke the doctrine of double jeopardy insofar as those forfeitures are likewise in personam and constituted the initial proceedings by the Government as to which it should have the first and only "bite at the apple."

E. The Forfeitures in Question Were Factually, Tactically, Statutorily, and Procedurally, In Personam and Punitive and Focused on Mr. Plunk.

Substantively and Procedurally the Administrative Forfeitures, that are the subject of this writ of certiorari, are in personam, punitive, and focused on Mr. Plunk

United States v. Ursery, 116 S.Ct. 2135 (1996), reversed Sixth Circuit in United States v. Ursery, Case No. 95-345, and Ninth Circuit in United States v. $405, 089.23, Case No. 95-346, precisely because administrative forfeitures at issue were "in rem civil forfeitures" and thus "neither punishment" nor criminal for purposes of Double Jeopardy Clause." Ursery at 2149.

The decision clearly distinguished such in rem civil forfeitures as non-punitive, due to their remedial purpose, and the fact they focused on punishment of the property as opposed to the person in contrast to "in personam civil or criminal penalties" citing the basic distinction recognized between "in rem civil forfeiture proceedings", which were not punitive and are characterized as remedial and against the property, and "in personam civil or criminal penalties" which are directed against a person and are punitive and thus invoke the double jeopardy clause as enunciated in United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). The

Ursery Court likewise relied on basic distinction, set out of One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (per curium) and Various Items of Personal Property v. United States, 282 U.S. 577 (1931), between in rem civil forfeiture proceedings as against the property (remedial and non-punitive), and in personam proceedings directed against the person (punitive and thus protected by double jeopardy).

Moreover, the Ninth Circuit panel in Plunk II, at 153 F.3d 1030, conceded the Ursery court had held "even some in rem civil forfeitures could constitute 'punishment' for double jeopardy purposes," acknowledging clear language by Ursery court in n.3 at 518 U.S. 289 that "[w]here the 'clearest proof' indicates that an in rem civil forfeiture is 'so punitive either in purpose or effect' as to be equivalent to a criminal proceeding, that forfeiture may be subject to the Double Jeopardy Clause [citing United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984)]."

Accordingly, when one recognizes that factually, tactically, statutorily and procedurally, the subject administrative forfeitures in the instant matter, which Judge Sedwick properly found were based upon the criminal conduct resulting in Mr. Plunk's conviction, were in personam criminal punitive forfeitures strategically directed at the person of Mr. Plunk to punish him, it follows Mr. Plunk and his property is entitled to the protection of the Double Jeopardy Clause precluding further punishment for same [App. 165-203].

To realize administrative forfeitures in question were in personam and a tactical choice by government directed against Mr. Plunk to punish him, as opposed to in rem against the properties, it is necessary to recognize the following. Seizures of the property were pursuant to criminal search warrant and arrest warrant affidavits. Notices of seizures were issued as a conscious punitive tactical ploy by the government, to gain the procedural benefits of 19 U.S.C. §

1602 et seq., as to lesser standard and shifted burden of proof, and "Hobson's choice" presented by resulting threat to Mr. Plunk's Fifth Amendment rights after Mr. Plunk was indicted for such underlying criminal conduct and/or contemporaneous with grand jury proceedings for same.

The planes, and much of the real property, were subject of Judge Sedwick's Judgment of Acquittal as to in personam criminal punitive forfeiture in U.S. v. Plunk, Case No. A94-0036 CR (JWS), which government appealed in Case No. A-96-30349, but then abandoned appeal. Government then re-instituted civil action in No. A-94-401 CIV, and began Action No. A96-335 CIV, to forfeit planes and said property, although they had lost the in personam punitive criminal forfeiture actions in criminal trial.

Having begun criminal search warrant/arrest warrant proceedings against Mr. Plunk, and indicted him, and in light of interplay between the Fifth Amendment rights and forfeitures, and resulting "Hobson's Choice," as a matter of basic due process it is clear the forfeitures in question were in personam punitive forfeitures under 18 U.S.C. § 853(j) and 881(d) and not in rem remedial forfeitures under 21 U.S.C. § 881(b) and (d), which purpose and effect was to punish Mr. Plunk. In essence government "severed," for tactical purposes, portions of forfeiture counts from indictment and proceeded by way of administrative in personam punitive forfeiture, and summary adjudication, and post-conviction civil in personam U.S. District Court forfeitures. Thus government is bound by the double jeopardy bar [App. 146, 163].

The substantive distinguishing factor of Mr. Plunk's case from the pure "in rem" forfeitures of Ursery or $405,089.23 is as follows. Pre-United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995) unavailability of use immunity pursuant to Simmons v. United States, 88 S.Ct. 967 (1968), for statements and claims of ownership in forfeiture

proceedings forced Mr. Plunk and his counsel to forego administrative claims precisely due to concerns of jeopardizing his Fifth Amendment and self-incrimination rights. In Ursery, no such Hobson's choice was procedurally present, since civil forfeiture proceedings were instituted prior to indictment. Likewise in $405,089.23, no such Hobson's choice was present, since forfeiture proceedings were instituted after conviction (with no evidence of appeal pending).

Here, it was very nature of tactical decision by prosecution to institute administrative in personam punitive forfeiture proceedings in midst of criminal prosecution that forced Mr. Plunk and his counsel to make the choice. This is precisely why prosecution should suffer double jeopardy bar having elected to "split out" property covered by the 21 U.S.C. § 853(a) forfeiture count in the indictment into 21 U.S.C. § 853(j) administrative in personam punitive forfeiture proceedings, and post-criminal trial (during appeal) in personam U.S. District Court actions. Reality of case, factually, procedurally, legally, and equitably, is forfeiture actions were in personam against Mr. Plunk as owner of property to force him to suffer prejudicial forfeitures preserve his Fifth and Sixth Amendment rights and punish him.

This statutory distinction, includes distinction set out in 21 U.S.C. 881(b), i.e. utilization of summary administrative forfeiture procedures of 19 U.S.C. § 1602 are only authorized under 21 U.S. C. § 853(j) wherein it utilizes 21 U.S.C. § 881(d) for property that has been seized under a criminal search warrant and/or arrest, and thus said forfeitures must be characterized as in personam punitive forfeitures, with attendant double jeopardy consequences, as opposed to property seized under civil process or otherwise, and not such criminal process, which property may be subject to 19 U.S.C. § 1602 summary forfeiture administrative procedures utilizing 21 U.S.C. § 881(b) and (d) and thus

characterized as in rem remedial forfeitures, with non-double jeopardy consequences, and has a sound constitutional, public policy, and statutory basis.

The very fact property is seized under criminal search warrant or arrest pursuant to a criminal arrest warrant, as in instant matter, has serious constitutional implications for defendant, insofar as by virtue of existence of probable cause as set out in the search warrant, or indictment and/or arrest warrant applications, government has focused on the defendant in personam as a criminal defendant target, which in turn has implications for his Fifth Amendment rights should he seek to file and/or assert a non-protected formal claim of ownership for the property. Accordingly, if government utilizes the summary forfeiture administrative procedures of 19 U.S.C. § 1602 with attendant advantages to government of lesser standard and burden of proof, requirement of a formal claim etc., as opposed to the criminal jury trial process of 21 U.S.C. § 853(a), or proceeds post-criminal trial (while on appeal) in in personam punitive civil actions with the "Hobson's choice," the government likewise should be charged with double jeopardy consequences for the in personam nature of such proceedings. It would be a constitutional and legal fiction to claim, that having proceeded with a criminal search warrant or criminal arrest warrant, the focus is "remedial", i.e., in rem against the property as opposed to "punitive", i.e., in personam against the defendant, to wit Mr. Plunk.

Judge Sedwick's rulings allowed government to proceed, notwithstanding its loss in in personam criminal forfeiture actions, due to different burden and standard of proof required in in personam criminal forfeiture to raise a rebuttal presumption of forfeitability, i.e. preponderance of the evidence, as opposed to probable cause.

Having availed themselves of this lesser standard of proof in the administrative in personam civil forfeiture actions

against the gold, guns, jewelry, and watch, and having further availed themselves of the benefit of the "Hobson's" choice to obtain summary punitive in personam forfeiture, and having failed at the criminal trial regarding forfeiture (i.e., suffering a judgment of acquittal) the government must likewise suffer the burden, namely, the double jeopardy bar. In short, once the criminal search warrant was obtained, the indictment was obtained, the arrest was made, and the seizures were pursuant to same, the forfeitures in question were clearly in personam punitive forfeitures directed against Mr. Plunk to punish him and not in rem remedial actions against the property. Having successfully obtained such in personam punitive administrative forfeitures of certain of the property due to its tactical procedural ploy of severing the in personam forfeiture counts as to said property by the utilization of 21 U.S.C. § 853(j) to institute and obtain 19 U.S.C. § 1602 et seq. administrative forfeitures, the government is likewise saddled with the burdens of its success, i.e. the double jeopardy bar.

The government may well now regret its choice and its hollow success in obtaining in personam punitive forfeiture and punishment of Mr. Plunk by virtue of such administrative forfeitures and its failure to obtain forfeiture at the criminal trial, but it is nonetheless chargeable with same and a double jeopardy bar applies.

The "bottom line" is that the government, having made its initial decision to proceed by way of in personam forfeiture of Mr. Plunk's property seized from his person and his home under a criminal arrest warrant and criminal search warrant so as to gain a procedural benefit and tactical advantage via the "fight on two fronts" and the resulting "Hobson's choice," and having obtained its "first bite at the apple" (in personam forfeitures and punishment), and then having convicted Mr. Plunk, but failing to obtain criminal forfeiture, is now precluded by the double jeopardy clause from seeking any further criminal prosecution or punishment

of Mr. Plunk, or forfeiture of his property, having in retrospect decided that the "first bite" (or even the "second bite") was not sufficient.

In conclusion it is clear, both factually and legally, due to nature of seizures, basis for seizures, timing of indictment, seizures, notices and forfeitures, the administrative forfeitures in question were a tactical choice by the government under 21 U.S.C. § 853(j), incorporating the provisions of 21 U.S.C. § 881(d), in turn incorporating provisions of 19 U.S.C. § 1602 et seq. and as such were, in both purpose and effect, in personam criminal punitive forfeitures directed at Mr. Plunk.

IX. SUMMARY AND CONCLUSION.

The forfeitures of Mr. Plunk's property were tactically, factually, statutorily and procedurally directed at him in personam, based on the same evidence and offenses for which he was facing indictment and trial, and instituted for strategic reasons so as to gain procedural advantage, "force a fight on two fronts," and present Mr. Plunk with a "Hobson's choice." In light of Ursery, given the "purpose and effect" of the initial administrative forfeitures were punitive and in personam, double jeopardy precludes the subsequent criminal prosecution, conviction, or sentence and punishment of Mr. Plunk, or subsequent punitive in personam forfeiture of his property. The Court should grant Certiorari and reverse.

Respectfully submitted this 16th day of September, 2003.

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